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No. 84-1414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FREDERIC HABERMAN, *et al.*,
Petitioners,

v.

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Respondents.

BRIEF OF WASHINGTON PUBLIC UTILITIES GROUP IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Washington unconstitutionally deny Petitioners' due process rights when it denied their motion to intervene after entry of final judgment based upon its conclusions that (1) the motion was untimely and (2) Petitioners' interests were, and since the inception of the litigation below had been, adequately represented by Chemical Bank, Bond Fund Trustee for Washington Nuclear Plants 4 and 5?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set forth at pages ii-vii of the Petition for Certiorari correctly identify the parties to this litigation. This Brief in Opposition to Petition for Certiorari is submitted by certain respondent Washington public utility districts and one Washington city, collectively referred to as the Washington Public Utilities Group. The Washington Public Utilities Group is comprised of the following: Public Utility District No. 1 of Benton County; Public Utility District No. 1 of Clark County; Public Utility District No. 1 of Cowlitz County; Public Utility District No. 1 of Grays Harbor County; Public Utility District No. 1 of Lewis County; Public Utility District No. 1 of Mason County; Public Utility District No. 3 of Mason County; Public Utility District No. 1 of Okanogan County; Public Utility District No. 2 of Pacific County; Public Utility District No. 1 of Skamania County; and, the City of Tacoma, Washington. The Washington Public Utilities Group represents shares of Washington Public Power Supply System Nuclear Projects 4 and 5 ("WNP 4 and 5") comprising approximately 45%.

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Petitioners Haberman, et al. have expressly taken the position that this Court need not even consider their Petition for Certiorari unless this Court first grants the Petition for Certiorari in *Chemical Bank and Washington Public Power Supply System v. Public Utility District No. 1 of Benton County, Washington, et al.*, No. 84-1258 (hereinafter referred to as "Chemical Bank"). Haberman Petition at 5-6. Respondents, the Washington Public Utilities Group, respectfully pray that this Court deny the Haberman Petition for Certiorari regardless of the disposition of the Chemical Bank Petition.

OPINIONS BELOW

The Petition accurately refers to *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 691 P.2d 524 (1984). In addition, however, several opinions and orders relevant to the issues raised by Petitioners were rendered by the trial court in *Chemical Bank v. WPPSS, et al.*, No. 82-2-06840-3 (Superior Ct. of Washington for King County). Those opinions and orders are more fully discussed at pages 6-11, *infra*.

JURISDICTION

These Respondents respectfully disagree with Petitioners that this Court has jurisdiction to review the judgment of the Supreme Court of Washington, particularly insofar as it relates to Petitioners.

Review on writ of certiorari to this Court of a decision of a state court of highest jurisdiction interpreting exclusively state law may be granted only if there is a substantial federal question. United States Supreme Court Rule 17.1. Contrary to Petitioners' assertions, there is no substantial federal question arising from the Washington State Supreme Court's disposition of the intervention issues raised by Petitioners. In essence, the motion in the Washington Supreme Court and this Petition are nothing more than six bondholders' selective expressions of dissatisfaction with certain litigation decisions made by their appointed Bond Fund Trustee, Chemical Bank. Such concerns, whether or not they are well founded, fail to provide any basis for this Court's certiorari jurisdiction.

STATEMENT OF THE CASE

The Group respectfully refers to and incorporates herein by reference the Statement of the Case set forth at pp. 5-9 of

the Group's Brief in Opposition To Petition For Certiorari filed in *Chemical Bank* (No. 84-1258).

REASONS FOR DENYING THE WRIT

Petitioners have failed to raise any substantial federal constitutional issues. The Washington State Supreme Court gave Petitioners a full and fair opportunity to brief and argue their intervention motion, and the motion was found to be deficient on both procedural and substantive grounds exclusively based upon state law. Like Petitioners in *Chemical Bank* (No. 84-1258), Petitioners here have advanced no legitimate justification for this Court to involve itself in this litigation.

1. Petitioners Have Failed to Meet This Court's Stringent Standards for Review of the Decisions of the Highest Court of a State.

Conspicuously absent from the Petition for Certiorari is any discussion whatsoever of this Court's time-honored and common sense reluctance to entangle itself in state court decisions concerning state law matters. This Court's standards for review of alleged constitutional violations differ dramatically when this Court is called upon to review the decision of the highest court of a state, as opposed to a lower federal court. Principles of federalism, comity, and abstention have come together to dictate that this Court show great deference and give overwhelming weight to the highest court of a state's resolution of both factual and state law issues. For example, it is a fundamental precept that, except in extremely limited circumstances which are discussed *infra*, this Court must accept as conclusive the construction given to a state statute or court rule by the highest court of a state. Thus, in *Ex parte Converse*, 137 U.S. 624, 631 (1890), this Court stated as follows:

> It is not our province to inquire whether the conclusion reached and announced by the supreme court was or was not correct, for we are not passing upon its judgment as a court of error . . . . But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

Mr. Justice Cardozo further developed and defined that line of authority in *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 362-65 (1932), when, on behalf of a unanimous Court, he held as follows:

> The inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's.
>
> * * *
>
> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.

Even assuming, *arguendo*, that there was an error of state law by the Washington Supreme Court, this Court has strictly adhered to the view that an error of state law simply does not provide the basis for a legitimate claim of denial of due process.

> We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process;

> otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Gryger v. Burke, 334 U.S. 728, 731, *reh'g denied*, 335 U.S. 837 (1948). Moreover, the Constitution simply does not guarantee that the decision of a state court shall be free from error. *Patterson v. Colorado ex rel. Atty. Gen.*, 205 U.S. 454, 461 (1906). *See Stein v. New York*, 346 U.S. 156, 181 (1952); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937); *Roberts v. New York*, 295 U.S. 264, 277-78 (1934); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-56 (1923).

The only extremely limited circumstance in which this Court has reviewed a state court decision on due process grounds is where the state court determination is totally arbitrary and unprincipled. *See, e.g., Hughes v. Washington*, 389 U.S. 290, 295-98 (1967); *Roberts v. New York*, *supra*, 295 U.S. at 277-78. As demonstrated below, this very narrow exception to the rule that this Court will not sit in judgment of state court determinations of exclusively state law issues is inapplicable to this litigation.

Petitioners have failed to come forward with a "substantial federal question" under this Court's standards for review of the decisions of the highest court of a state. Thus, this Court is without jurisdiction to proceed further in this litigation.

2. Petitioners Have Failed to Show That Their Due Process Rights Were Violated

The core of Petitioners' due process argument is that they allegedly were denied any meaningful opportunity "to be heard in a court of law with respect to the adjudication of claims affecting [their] property interests." The record affirmatively demonstrates, however, that at all relevant times

the Petitioners' interests were fully and vigorously represented.

The Washington Supreme Court squarely addressed and explicitly resolved this threshold issue when it held as follows:

> We turn now to the subsidiary question of whether the bondholders are bound by the results of this litigation. The trial judge's order released all claims, including the bondholders', raised against the participants. The declaratory judgment statute, however, states that an interested party who is not joined cannot be prejudiced by the results of the declaration. Since the bondholders are certainly parties who have an interest in the litigation, we must decide whether this section of the statute will be interpreted literally. If so, that portion of the order pertaining to the bondholders must be struck.
>
> We believe that this result would be improper, where, as here, the interested parties have a *designated representative*. The bond resolution stated that the bond trustee, *i.e.*, Chemical Bank, was to represent all bondholders. [Footnote deleted.] Chemical Bank has served in this capacity for the entire history of this action, and vigorously pressed the bondholders' claims. Under these circumstances, the bondholders must abide by the results obtained by their designated representative.

Chemical Bank v. WPPSS, *supra*, 102 Wn.2d at 888-89, 691 P.2d at 533. In making this determination that the bondholders—including Petitioners—had indeed been accorded their "day in court," the Washington Supreme Court had before it a richly developed and thoroughly detailed record on this very issue. The history surrounding the

relationship between Chemical Bank and the bondholders is particularly relevant insofar as it relates to, and demonstrates the propriety of, the Washington Supreme Court's denial of the Petitioners' intervention motion.

The trial court below initially began a detailed analysis of the relationship between Chemical Bank and the bondholders in mid-1982 as the result of a motion brought by certain defendants for compulsory joinder of the bondholders pursuant to CR 19(a), or in the alternative for dismissal of the action for failure to join indispensable parties (the bondholders) pursuant to CR 19(b). After extensive briefing and oral argument, the trial court orally denied this motion on August 26, 1982. On September 15, 1982, the court filed a written order with regard to the August 26, 1982 oral decision. In part, that September 15, 1982 Order provides as follows:

> 1. The defendants' motion for compulsory joinder of bondholders or in the alternative for dismissal of this action pursuant to CR 19 is denied, inasmuch as *the interests of all holders of bonds* issued by the Washington Public Power Supply System pursuant to its Board of Directors Resolution No. 890 or resolutions supplemental thereto *are represented in this action by and will be protected by Chemical Bank, and all such bondholders will be bound by any judgment which may be entered in this action* . . . . (Emphasis added.)

Despite this definitive ruling that Chemical Bank completely and adequately represented the interests of the bondholders in this litigation, on its own initiative the trial court again inquired into the nature of the relationship between Chemical Bank and the bondholders in May, 1983. The second in-depth consideration of this issue arose in connection with a motion by the Supply System for a man-

datory preliminary injunction which would have required, *inter alia*, disbursement to the Supply System of certain funds held in a Court-approved escrow.[1]

On May 3, 1983, the trial court held a hearing to consider the procedure to be followed with regard to the Supply System's motion. During that hearing, the court called for additional briefing with regard to the issue of its jurisdiction to restrain both Chemical Bank and the bondholders from declaring a default. The Court stated as follows:

> The Court will . . . receive briefs and consider arguments as to jurisdiction, and . . . the Court also will hear arguments with respect to the questions posed today in terms of its ability to consider alternative forms of relief such as a restraining order restraining the bond fund trustee from declaring a default for failure to make the interest payments, given the fact that there is at this time sufficient money in the escrow account that can function as security for the interest payments, at least for the month of May and perhaps for the month of June.
>
> . . . It is clear that *the bond fund trustee and the bondholders through the trustee have come before the Court* seeking invocation of the Court's jurisdiction to enter a determination that they are entitled to payment of the interest and principal on the bonds pursuant to the terms of the Participants' Agreement.
>
> It is also clear that they are asking the Court, and if the Court ultimately rules in their favor, will be asking the Court to take whatever steps are necessary to enforce that. It would seem, likewise, apparent that

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[1]This escrow is more fully discussed at p. 8 of the Group's Brief in *Chemical Bank* (No. 84-1258).

they would then be bound by any orders or determinations that the Court would make during the pendency of the litigation, if such orders were made for the purposes of attempting to preserve the status quo so that a trial on the merits could occur, so that justice could be rendered to whichever party prevails.

Likewise, *their position has been all along that whatever ruling the Court would make with respect to the final merits would be binding certainly on the bond fund trustee and the bondholders, because, pursuant to the terms of the agreement, they have conferred on the bond fund trustee the authority to bring this type of action.* So, those are issues that I want you to explore. (Emphasis added.)

In response to this call for additional briefing, numerous memoranda were filed, and on May 24, 1983, the court heard additional oral argument with regard to Chemical Bank's power and authority to represent the interests of the bondholders. On May 24, 1983, the Court orally ruled as follows:

The question of jurisdiction has been raised as to whether the Court can enter an order that would be effective in this regard as against Bondholders. I think that question must be answered in the affirmative. The Court relied heavily on *Kerrison against Stewart* reported in 23 Lawyers Edition 843, 93 U.S. 15, when it ruled on the question that was before the Court many months ago as to whether Bondholders were necessary parties and whether this action should be certified as a class action.

It is [worth it] again to quote the language in that case. The quote is on page 845. "It cannot be doubted, that under some circumstances, a trustee may represent his beneficiaries in all things relating to their

common interests in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it in whole or in part."

The critical language is this, and I will repeat. "He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him."

When the Court ruled previously, the Court went into some detail in reaching the conclusion that the Bond Fund Trustee in this situation occupied such a position. Nothing has caused the Court to change its mind in that regard. I won't quote this language. I'll just refer it to you and incorporate it by reference into the Court's ruling in this regard, but if one carefully reads the position taken by Chemical Bank at that time, the arguments that they have advanced I believe are entirely consistent with what the Court has said in this ruling.

On May 27, 1983, the trial court entered an Order Restraining Declaration of Default. In pertinent part that Order provides as follows:

3. *Chemical Bank, and all persons and entities presently or hereafter owning or holding any bonds, or any interests therein or thereunder,* heretofore issued

> by the Washington Public Power Supply System under or pursuant to its Board of Directors Resolution No. 890, or resolutions supplemental thereto, in connection with its Projects Nos. 4 and 5, are hereby restrained and enjoined, pending entry of judgment in this case declaring the parties' respective rights and obligations, or until further order of the Court, from declaring a default under said Resolution No. 890, or resolutions supplemental thereto, or from exercising any remedies upon any such default, including but not limited to (i) issuing a notice of default under or pursuant to Section 11.1(3) of said Resolution No. 890 or (ii) declaring the principal of outstanding bonds, or any interest accrued thereon, to be due and payable immediately[.] (Emphasis added.)

Chemical Bank never sought appellate review of any of these rulings. More significantly, Petitioners have never discussed, much less objected to or sought review of, these rulings before either the Washington Supreme Court or this Court.

In fact, Petitioners have failed both below and in this Court to come to grips with the fundamental issue raised by their proposed intervention: under all the circumstances of this particular litigation, was intervention by these six individual bondholders necessary in order for them to attempt to assert the interests which they seek to protect? If intervention was not necessary for that purpose—and it was not—then no rights of Petitioners have been affected, much less violated in any way.

No matter what legal guidelines this Court chooses to follow in reviewing the intervention rulings below, it is clear that those rulings were well-reasoned, principled and amply supported by the record. For example, Washington State's

Superior Court Civil Rule 24(a) provides, in pertinent part, as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.* (Emphasis added.)

Accordingly, under the circumstances of this litigation, this Court's primary inquiry is whether, as a matter of purely state law, the Washington Supreme Court and the trial court committed virtually unprincipled error when they determined that Chemical Bank had adequately represented the interests of the potential intervenors *with regard to the issues before those Courts.* Apart from expressing some disagreement with some of the Bank's litigation decisions, however, Petitioners have come forward with no arguments which would call into question the vigor and adequacy of the manner in which the Bank discharged its duties as Petitioners' *designated representative.* The law is clear, of course, that a mere difference of opinion concerning litigation strategy or tactics does not render inadequate the representation of those whose interests are identical with an existing party which formally represents those interests in the litigation. *See, e.g., Pierson v. United States,* 71 F.R.D. 75, 80 (D. Del. 1976).

The simple fact is that Petitioners have raised no legitimate issues, much less any issues of a federal constitutional nature, concerning the adequacy of the Bank's representation of Petitioners' interests relative to the issues involved in

the litigation below. Moreover, that conclusion is inevitable whether Petitioners' claimed deprivation of federal constitutional rights is analyzed by the standards set forth in either Washington State's Superior Court Rule 24, *supra*, or RCW 7.24.110, the state statute upon which Petitioners place so much reliance.

In pertinent part, RCW 7.24.110 provides as follows:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the persons not parties to the proceeding.

In its most recent opinion in this litigation, the Washington Supreme Court analyzed the provisions of both RCW 7.24.110 and Civil Rule 24 and resolved the apparent conflict between the statute and the court rule by providing that timely application for intervention is necessary even when the basis of the intervention is RCW 7.24.110. Petitioners, relying exclusively upon *Williams v. Poulsbo Rural Tel. Ass'n*, 87 Wn.2d 636, 555 P.2d 1173 (1976), contend that the Washington Supreme Court's interpretation of RCW 7.24.110 as requiring timely action constitutes a violation of Petitioners' due process rights. Once again, however, Petitioners have failed to realize that the key issue with which they must deal is whether or not they can demonstrate that there was any *need* for them to intervene. In addition, Petitioners have failed to bring to the attention of this Court that although it is normally the case that a declaratory judgment cannot be entered in Washington State unless the Court has before it all parties whose rights would be affected and whose interests would be prejudiced, the courts of Washington State have long recognized an exception to this principle when the rights of the "absent" parties are

"virtually represented" by parties to an action. For example, in *Fahrenwald v. Spokane Savings Bank*, 179 Wash. 61, 63, 35 P.2d 1117 (1934), the Court defined the doctrine of virtual representation as follows:

> This doctrine involves an exception to the rule that all those interested and affected must be made parties, and is applied when the representation is fair and the parties represented have a common interest with those before the Court. [The doctrine of virtual representation] is particularly applicable if there is an identity of subject matter.

The Court in *Fahrenwald, supra*, also quoted with approval the following language from *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662, 672 (1914):

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire party, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all would be properly protected and maintained.

Fahrenwald, supra, 179 Wash. at 66, 35 P.2d at 1119. *See State ex rel. Cannery Workers & Farm Laborers Union v. Superior Court*, 30 Wn.2d 697, 700, 193 P.2d 362 (1948) (applying the equitable doctrine of virtual representation

and finding that certain members of a union could represent and bind all other union members).

Significantly, the doctrine of virtual representation was most recently cited by the Washington Supreme Court in *Williams v. Poulsbo Rural Tel. Ass'n, supra.* In that case, the Washington Supreme Court painstakingly analyzed the potential interests of a number of different types of individuals and entities which, under a number of different theories, might have been necessary parties to that litigation. With regard to certain beneficiaries of a retirement plan involved in that litigation, the court considered a number of exceptions "to the general rule that all beneficiaries must be joined in an action by a beneficiary against a trustee." *Williams, supra,* 87 Wn.2d at 648, 555 P.2d at 1181. Among the well-recognized exceptions which the Court considered was the doctrine of virtual representation. With regard to that exception, the Court in *Williams,* held as follows:

> [T]he doctrine of virtual representation is not applicable to allow plaintiffs to sue individually because the absent beneficiaries do not necessarily have a common interest with the plaintiff.

Id. In the litigation now before this Court, however, the trial court and the Washington Supreme Court have already decided that, as a matter of state law, bondholders, including the six Petitioners, and Chemical Bank did have a completely common interest in the subject matter of the issues raised during the state court litigation. Accordingly, under those circumstances, Petitioners had absolutely no need personally to become parties to the state court litigation, and they had absolutely no right to do so pursuant to RCW 7.24.110.

Petitioners' argument concerning RCW 7.24.110, as well as all other arguments advanced by petitioners in this

Court, provide no basis for this Court to exercise its certiorari jurisdiction. In fact, Petitioners themselves have curiously, but explicitly, acknowledged that there is no good reason for this Court to consider Petitioners' conditional Petition. At p. 5 of their Petition, Haberman, et al., state as follows:

> Because petitioners Haberman, et al., have other avenues of relief available to them—the Haberman lawsuit in state court—petitioners initially did not intend to seek review of the Washington State Supreme Court's denial of intervention.[2]
>
> [2]Petitioners are also members of the plaintiff class in *In re Washington Public Power Supply System Securities Litigation, MDL 551.*

This Petition, whether it is conditional or not, is both ill-founded and unnecessary. The Petition should be denied and petitioners should attempt to avail themselves of what they themselves characterize as the other adequate avenues of relief available to them.

CONCLUSION

Petitioners have failed to frame any substantial federal constitutional issues which could give rise to this Court's certiorari jurisdiction. For all the reasons set forth above, the Petition For Certiorari should be denied.

RESPECTFULLY SUBMITTED this 10th day of April, 1985.

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